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JAMES E. DUNSTAN
ADMITTED IN D.C. AND VA

September 27, 1995

OUR FILE NO.
0080-108-63

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: MM Docket No. 95-92

Dear Mr. Caton:

Submitted on behalf of GREAT TRAILS BROADCASTING, INC., is its "COMMENTS" in the above-referenced proceeding. Enclosed are an original and eight copies, a copy for each Commissioner.

If there are any questions concerning this matter, please communicate directly with this office.

Respectfully submitted,

GREAT TRAILS BROADCASTING, CORP.

James E. Dunstan
Its Attorney

JED/cap

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The

Federal Communications Commission

Washington, D.C. 20554

In The Matter Of	)	
	)	
Review of the Commission's	)	MM Docket No. 95-92
Regulations Governing Programming	)	
Practices of Broadcast Television	)	
Networks and Affiliates	)	DOCKET FILE COPY ORIGINAL

To: The Commission

COMMENTS OF GREAT TRAILS BROADCASTING CORP.

Great Trails Broadcasting Corp. ("Great Trails"), by its attorneys, hereby files these comments concerning the *Notice Of Proposed Rule Making*, FCC 95-254, released June 15, 1995 *("NPRM")*, in the above-referenced proceeding. Great Trails provides comments herein only on the network territorial exclusivity rule, 47 C.F.R. §76.658(b), discussed in the *NPRM* at ¶¶44-50, and takes no position as to other aspects of the *NPRM*. In support of its Comments, Great Trails submits:

I. BACKGROUND

WHAG-TV, Channel 25, is licensed to Hagerstown, Maryland. WHAG-TV signed on the air 25 years ago, in January, 1970, and has been an NBC affiliate since that date. *See* Declaration of Hugh J. Breslin, III, General Manager of WHAG-TV, attached hereto. The city of Hagerstown is located approximately 60 miles from Washington, D.C., in northwestern Maryland.

Arbitron historically placed WHAG-TV in a single-county Area of Dominant Influence ("ADI"), encompassing Washington County, its home county. With Arbitron out of the TV ratings business, WHAG-TV now is left without a market, since Nielsen has failed to create a Designated Market Area ("DMA") for WHAG-TV, instead lumping Washington County in with the Washington, D.C., DMA.

WHAG-TV has had a long tradition of serving its local viewers. It currently airs over two and a half hours of local news every day, as well as local public interest programming.[1] WHAG-TV's local news coverage stresses news relevant to its local viewers, rather than the District of Columbia, Congressional, and national news which pervade the newscasts of the Washington, D.C. stations. The FCC noted the importance of WHAG-TV's local service in its recent order significantly expanding WHAG-TV's must-carry zone to include communities in ten surrounding counties. *In re Great Trails Broadcasting Corp.*, DA 95-1700, released August 11, 1995, at ¶¶11, 22.

WHAG-TV is able to provide this level of local news *only* because it has been able to acquire and maintain an affiliation with a major network (NBC). Without both the compensation from the network and the strong "push and pull" of NBC programming, WHAG-TV would be unable to maintain its current level of local news programming. Indeed, without a network affiliation, WHAG-TV's continued viability would be extremely problematic.

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1 WHAG-TV airs the following local news programming: 6:30-7:00 a.m.; five minute inserts at 7:25 a.m., 7:55 a.m., 8:25 a.m. and 9:55 a.m. weekdays; 5:30-6:00 p.m., 6:00-6:30 p.m.; and 11:00-11:35 p.m. In addition, WHAG-TV airs "Today In The Valley," a five minute insert every weekday at 8:55 a.m. in which it provides local non-profit organizations the chance to publicize themselves and upcoming community events. WHAG-TV also airs "Viewpoint 25" on Sunday mornings from 10:00-10:30 a.m., right after NBC's "Meet The Press" as a local public affairs program focusing issues of critical importance to the communities served by WHAG-TV.

II. THE FCC SHOULD NOT AMEND SECTION 73.658(b)

Section 76.658(b) contains two limitations on the ability of a network and its affiliates to exclusively contract for programming. The first limitation prevents an affiliate from entering into a network agreement which prevents another station located in the same community from acquiring network programming not aired by an existing affiliate in the same community. 47 C.F.R. §76.658(b). The second prong prevents contracts which restrict the rights of stations in other communities from acquiring network programming. *Id.* The FCC also is looking to either amend or eliminate the second prong of §76.658(b) as well. *Id.* at ¶49. It seeks comment on whether a station's zone of exclusivity should remain in its city of license only, or be expanded to some other area, possibly its Grade B contour, or its DMA.

A. Networks Effectively And Efficiently Control The Network Territorial Exclusivity Zones Through Their Affiliation Practices

Great Trails submits that no change is needed to §76.658(b) because the networks themselves control the exclusivity zones of their affiliates by their affiliation practices. Generally, networks do not grant network affiliations to two adjacent cities.[2] This is based on a decision by the network that to affiliate with two adjacent stations would not extend the viewer base of the network (the prime motivation of networks to affiliate with local stations), but rather would diminish the total value of their product due to overexposure.[3]

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2 **For instance, in closely grouped hyphenated markets such as Tampa-St. Petersburg, Dallas-Fort Worth, and Minneapolis-St. Paul, networks will affiliate with only one station in those communities.**

3 *See Amendment of Parts 73 and 76 of the Commission's Rules relating to Program Exclusivity in the Cable and Broadcast Interests,* 3 FCC Rcd. 5299, 5319 (1988)("*Syndex Order*").

Conversely, in those markets where over-the-air coverage is not possible through an affiliation with a single station, networks often will affiliate with more than one station. A prime example of this is the Grand Rapids-Kalamazoo-Battle Creek market, where, because of site restrictions, the ABC affiliate licensed to Grand Rapids cannot cover the entire market. Thus, ABC has also affiliated with a Battle Creek station, so that it can be assured of reaching all viewers in the market. Similarly, in very large geographic markets such as Denver or Salt Lake City, which reach for many hundreds of miles, networks affiliate with stations located in outlying areas, to maximize over-the-air coverage.

WHAG-TV is one of those outlying stations. WHAG-TV is strategically located between the Washington, D.C., Pittsburgh, Pennsylvania, and Johnstown-Altoona, Pennsylvania, markets. Although surrounded on most sides by the Washington, D.C., ADI, as the FCC found in *In re Great Trails, supra*, WRC, the Washington, D.C. NBC affiliate fails to cover much of this area with its over-the-air signal. It relies on its strong cable carriage through the market to get its signal to its viewers, some located up to 125 miles away. It is WHAG-TV which delivers NBC programming over-the-air free to these same viewers.

B. Elimination Of Section 76.658(b) Would Allow Major Market Affiliates To Squeeze Out Outlying Stations In Their Markets

What keeps the current network affiliation system working is the fact that major market stations are precluded by §76.658(b) from exercising their significant market control by demanding that their network not affiliate with any other station in the market, no matter how geographically large the market. With the emergence of the Fox Network and now UPN and WB, even the major networks are having to scramble to acquire and keep affiliates in the top 50 markets. The Commission need look no further than the events since May of 1994, when Fox and New World Communications announced a deal which significantly altered the network affiliation landscape. The three "major" networks were no longer guaranteed a VHF outlet in each of the top 50 markets, and NBC, CBS, and ABC were forced to work hard to keep their existing affiliates in the face of challenges from other networks. Many group owners were able to obtain major network affiliations for their UHF stations by threatening to move their VHF stations in other major markets to other networks.[4]

Had §76.658(b) not been in effect over the last two years, there would have been very significant pressure put on the networks by major market affiliates to pull the affiliations of less important outlying stations in order to guarantee delivery of network programming to the core of the market by a strong VHF station. This leads to the critical question of whether the public interest is served by allowing major market stations to deny affiliations to outlying stations which provide the only over-the-air signal to significant portions of large geographic markets. Clearly, the answer is no, and the FCC cannot even come up with a compelling positive impact resulting from the elimination of §73.658(b), other than to simplify theoretical market constructs. *NPRM*, at ¶49. The FCC therefore should not touch the current territorial exclusivity rule.

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[4] *See, e.g., Letter to Eugene F. Mullin, Esq.*, DA 95-855, released April 20, 1995 (referring to the affiliation changes in the Phoenix, Arizona, market when Scripps Howard and ABC signed a multiple market deal which included ABC taking away its Phoenix affiliation from a very strong VHF station and giving it to a Scripps Howard UHF station).

III. THE FCC SHOULD ONLY EXPAND THE TERRITORIAL EXCLUSIVITY RULE TO MATCH THE 35 MILE ZONE USED FOR SYNDICATED EXCLUSIVITY

If the Commission determines that it simply cannot resist the temptation to modify §76.658(b), then it should expand the network exclusivity zone *no further* than the 35 mile zone currently used in §73.658(m) to determine the maximum exclusivity zone for syndicated exclusivity (Syndex). As discussed below, the 35 mile zone concept has served the Commission well for many years, and should be used here. The other proposals put forth by the Commission for exclusivity zones (Grade B contour or DMA), are both unworkable and would severely damage the ability of "overshadowed" stations to deliver free over-the-air network programming to viewers beyond the core geographic area of many markets.

A. The 35 Mile Zone Remains The Best Compromise

If a change to Section 73.658(b) is deemed necessary, the Commission should look hard at the 35 mile zone established in §73.658(m). It has served as the basis for syndicated programming exclusivity zones for more than 20 years. *First Report and Order in Docket No. 18179*, 42 FCC 2d 175 (1973), *modified, Memorandum Opinion and Order in Docket No. 18179*, 46 FCC 2d 892 (1974). In that proceeding, the FCC balanced the need of stations for some exclusivity versus the public interest in assuring diversity of programming and limiting the market power of larger stations. The FCC noted that placing no limits on the amount of exclusivity a station could purchase might violate the antitrust laws. 46 FCC 2d at 898, *citing United States v. Paramount*

Pictures, Inc., 66 F.Supp. 232, 70 F.Supp. 53 (S.D.N.Y. 1947). At first, the FCC concluded that a 25 mile zone was appropriate, 42 FCC 2d at 183, but later expanded it to 35 miles after reviewing the physical layout of the major television markets as well as the table of allocation of television stations as of the early 1970s. 46 FCC 2d at 897-98. The 35 mile zone adopted in 1974 also paralleled the cable exclusivity rules, adopted in 1972. *Cable Report and Order*, 36 FCC 2d 143 (1972). The Commission noted the benefit of having consistent mileage zones among its various rules. 46 FCC 2d at 897.

Similarly, there would be a benefit here to adopting consistent exclusivity zones for network and syndicated programming between broadcasters, as well as cable exclusivity zones. As discussed more fully below, only use of the 35 mile zone can result in such consistent zones without the Commission embarking on wholesale revisions to its territorial exclusivity rules (Sections 73.658(b) and 73.658(m)), as well as its cable network nonduplication and Syndex rules (Sections 76.92 and 76.151). For this reason, Great Trails urges the Commission to adopt a 35 mile zone for network territorial exclusivity if a change is required.

B. A Grade B Contour-Based Mileage Zone Harms UHF Stations And Would Be Impossible To Administer

The FCC requests comments on the possibility of expanding the network territorial exclusivity rule to include the Grade B contour of stations. *NPRM*, at ¶49. This is inadvisable for two reasons. First, the "UHF handicap" still exists. Although cable carriage has helped diminish the differences between VHF and UHF coverage, the fact of the matter is that VHF stations still are able to cover more area than UHF stations. Thus, a Grade B contour-based mileage standard would immediately put all UHF stations at a significant disadvantage. VHF stations would have greater exclusivity zones than UHF stations based solely on the band in which they transmit.[5]

Second, a Grade B contour-based mileage zone would be extremely difficult to implement, because every station's Grade B contour is different. Each time an affiliation change was made in a major market, the surrounding market affiliation agreements would have to be reviewed to see whether or not the affiliation now is in conflict with the new rule.[6] The Commission could well find itself cast in the role of arbiter of network-affiliate mileage disputes similar to that which the Commission was able to avoid in the Phoenix market because of the way the rule currently is written. *See Letter to Eugene F. Mullin, Esq., supra.*

C. A DMA-Based Mileage Zone Would Spell Disaster In Many Markets And Could Well Destroy WHAG-TV

Finally, the Commission seeks comment on whether the exclusivity zone should be expanded to cover a station's DMA. *NPRM*, at ¶49. As stated above, Great Trails strongly urges the FCC not to adopt such a standard for a number of reasons. First, this alternative has been rejected by the FCC in the past as unworkable. Indeed, when the FCC looked at the appropriate exclusivity zone for syndicated programming in 1974, it explicitly rejected use of an ADI-wide zone because of often changing market definitions, and the harm such a zone would have on

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[5] It should be noted that the FCC previously has considered adopting a Grade B contour-based mileage zone on several occasions, and each time has reached the proper conclusion that such a system would be inequitable and unworkable. *See First Report and Order in Docket No. 18179, supra.*

[6] In large hyphenated markets such as Orlando-Daytona Beach-Melbourne-Cocoa-Clermont, the ripple effects of a single change could impact an entire state.

non-ADI stations and "overshadowed" stations.[7] The FCC has pointed to nothing in the present *NPRM* which indicates that a market-based exclusivity zone is any more workable today, or would pose any less of a threat to outlying viewers.

Second, giving major market stations the ability to expand their power base beyond their core market and beyond their coverage area in many instances contravenes the public interest the same way today as it did 20 yeas ago. WHAG-TV is not the only station which would be destroyed if a neighboring major market station were able to demand and receive exclusivity throughout its market. In most western markets, such as Denver, Salt Lake City, and Albuquerque-Sante Fe, more than one affiliate of each network serves the market. Yet it is easy to conceive that a Denver affiliate might threaten to go to another network unless its existing network pulled all other affiliations in the market. Given the choice between maintaining a VHF affiliate in Denver or losing one in Rawlings, Wyoming (in the Denver DMA), the ultimate outcome is self-evident.

The Commission experienced these exact situations in the early days of network television, when major market stations attempted to freeze out newer stations in adjacent areas through their market power, which resulted in the adoption of what is now Section 73.758(b).[8] Once these outlying stations lose their network affiliations, they will be forced

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7 *First Report and Order in Docket No. 18179*, 42 FCC 2d at 182 ("use of the [ADI] standard would create uncertainty in negotiations because factual disputes concerning the location of the boundaries and because such boundaries would be changing").

8 *American Broadcasting Co.*, 17 RR 458 (1958); *Columbia Broadcasting System, Inc.*, 17 RR 439 (1958). In those cases, the Commission found a very strong public interest in limiting the power of major market affiliates to deny affiliations with stations in outlying areas within their markets.

immediately to curtail local news and other expensive programming. The result would be that for any person located more than 50 or so miles from a major metropolitan center, they would be forced to subscribe to cable to receive network programming, and would lose most access, if not all, to truly local news. Sacrificing those persons on the altar of economic theory purity is wrong, and repugnant to the still important concepts of diversity and localism which are supposed to govern the decisions of the Federal Communications Commission.

IV. CONCLUSION

The network territorial exclusivity rule is not broken, and any attempt to fix what is not broken will wreak havoc on the current system of network affiliations. If the Commission concludes that some change is absolutely necessary, then the network territorial exclusivity rule should be amended to expand the exclusivity zone up to 35 miles, and no further. Any other approach is inequitable, unworkable, and would result in a net loss of significant local programming.

Respectfully Submitted,

GREAT TRAILS BROADCASTING CORP.

James E. Dunstan
Its Attorney

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(703) 841-0606

September 27, 1995

DECLARATION OF HUGH J. BRESLIN, III

1. I am Hugh J. Breslin, III, General Manager of WHAG-TV, Channel 25, Hagerstown, Maryland.

2. I have reviewed the attached Comments Of Great Trails Broadcasting Corp.

3. WHAG-TV airs the following local news programming. Weekdays we air a half-hour of local news from 6:30-7:00 a.m. We provide five minute inserts in NBC weekday programming at 7:25 a.m., 7:55 a.m., 8:25 a.m. We air back-to-back local news shows from 5:30-6:00 p.m. and 6:00-6:30 p.m. Finally, we air a local news program from 11:00-11:35 p.m., seven nights a week.

4. In addition, WHAG-TV airs "Today In The Valley", a five minute insert every weekday at 8:55 a.m. in which we provide local non-profit organizations the chance to publicize themselves and upcoming community events. Finally, we air "Viewpoint 25" on Sunday mornings from 10:00-10:30 a.m., right after NBC's "Meet The Press" as a local public affairs program focusing issues of critical importance to the communities served by WHAG-TV.

5. Loss of our affiliation would mean the end of most, if not all, of this vital local programming. We can only afford to air this much local news and public affairs programming because of the network compensation we receive, as well as the fact that NBC programming provides us the audiences we need to sell advertising to support the station.

6. Although we have had a strong relationship with NBC in the past, given the monumental changes in network-affiliate relations over

the last year, we can no longer count on NBC continuing our affiliation if Section 73.658(b) is eliminated, and major market affiliates are allowed to flex their market muscles and attempt to squeeze out stations like WHAG-TV.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Hugh J. Breslin, III
General Manager, WHAG-TV

Date: September 27, 1995

CERTIFICATE OF SERVICE

I, Carol A. Park, an employee of Haley Bader & Potts, P.L.C., certify that on this 27th day of September, 1995, copies of the foregoing "**COMMENTS OF GREAT TRAILS BROADCASTING, INC.,**" were sent by first-class postage prepaid U.S. First Class mail, to the following:

* Honorable Reed E. Hundt, Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

* Honorable James H. Quello, Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

* Honorable Andrew C. Barrett, Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 826
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* Honorable Susan Ness, Commissioner
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Carol A. Park

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* Hand-delivered